Office-Supreme Court, U.S.
FILED
AUG 26 1981
ALEXANDER L. STEVAS,

No. 81-49

In the Supreme Court of the United States

OCTOBER TERM, 1980

EASTERN AIR LINES, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether an amendment, effective in 1974, to petitioner's retirement plan, lowering the mandatory retirement age for flight attendants from age 65 to 62, violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-14) has not been reported.[1] The opinion of the district court (Pet. App. 15-28) is reported at 474 F. Supp. 364.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1-2) was entered on April 14, 1981. The petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]The opinion is designated "Do not publish." The Equal Employment Opportunity Commission moved for publication of the opinion on April 29, 1981. The court of appeals has not yet ruled on the motion.

STATUTE INVOLVED

As originally enacted, Section 4(f)(2) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(f)(2) provided:

> (f) It shall not be unlawful for an employer, employment agency, or labor organization * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter * * *.[2]

STATEMENT

In August 1977, the Secretary of Labor[3] filed this employment discrimination action alleging that petitioner, Eastern Air Lines, violated the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. 621 *et seq.*, by amending its retirement plan in 1973 to lower the normal retirement age for flight attendants from 65 to 62

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[2]Section 4(f)(2) has since been amended by Section 2(a) of Pub. L. No. 95-256, 92 Stat. 189, 29 U.S.C. (Supp. III) 623(f)(2), to provide, (emphasis added):

> (f) It shall not be unlawful for an employer * * *
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, *except that * * * no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual * * * [between 40 and 69 years of age] because of the age of such individual.*

[3]Congress and the President transferred the Secretary of Labor's enforcement responsibilities under the ADEA to the respondent, Equal Employment Opportunity Commission (the "EEOC"), on July 1, 1979. Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The EEOC was substituted as plaintiff in this action on January 23, 1980.

and subsequently requiring eight flight attendants to retire involuntarily pursuant to the amended plan. Petitioner contended that the amendment and resulting retirements fell within the exception in Section 4(f)(2), 29 U.S.C. 623(f)(2), as it stood prior to 1978, for personnel actions taken in "observ[ance of] the terms of a bona fide * * * retirement * * * plan, which is not a subterfuge to evade the purposes of [the Act]."

1. The facts in this case were stipulated and are summarized in the court of appeals' opinion (Pet. App. 5, 16-19). Since October 1, 1947, petitioner has maintained a retirement plan for its flight attendants. The plan requires participants to retire at the "normal retirement age." Until December 31, 1973, the "normal retirement age" was 65. On April 26, 1973, petitioner and the Transport Workers Union ("TWU") entered into a letter of agreement amending their collective bargaining agreement to establish, effective January 1, 1974, age 62 as the normal retirement age for flight attendants. In June 1974, during negotiations for a new collective bargaining agreement, the TWU initially proposed that the retirement age for flight attendants be reduced to age 60, with an option to work until 62. However, on July 15, 1974, after it had been advised by counsel that its original proposal would violate the ADEA, the union amended its proposal to give employees the option to remain until age 65. At that time, the union informed Eastern that the existing plan was of questionable legality. The issue was not discussed further until the final day of negotiations, at which time petitioner advised the union that its counsel believed the existing plan complied with the ADEA. On November 8, 1974, petitioner and the TWU formally entered into a collective bargaining agreement which retained the provision treating age 62 as the normal retirement age for flight attendants. During the period from January 1, 1974, through June 30, 1977, eight flight attendants were involuntarily retired at age 62 (Pet. App. 17).

Effective July 1, 1977, the TWU and petitioner entered into a collective bargaining agreement which specified that the normal retirement age was 62 but gave employees the option to remain employed until age 65 (Pet. App. 17-18).

2. The district court granted the Secretary of Labor's motion for partial summary judgment and denied Eastern's motion for summary judgment (Pet. App. 15-28). The court held that the mandatory retirement provision of Eastern's plan was a subterfuge to evade the purpose of the ADEA within the meaning of Section 4(f)(2) of the Act, 29 U.S.C. 623(f)(2) (Pet. App. 21-26). The court emphasized that Eastern had amended the retirement plan after the passage of the Act to provide for a lower retirement age, had been informed by the union of the questionable legality of its actions, and had "presented no evidence to show that the early retirement amendment to its retirement plan had any business purpose other than arbitrary age discrimination" (Pet. App. 24-25). The district court granted relief in the form of back pay for the eight affected employees, reinstatement for one employee, and an injunction against future violations of the ADEA (Pet. App. 29-36).

A unanimous court of appeals affirmed. The court rejected petitioner's argument that a retirement plan which is amended after the passage of the ADEA can never be a subterfuge to evade the Act if the plan is bona fide, *i.e.*, exists and pays substantial benefits (Pet. App. 7-11). The court of appeals concluded that where an employer cannot show a lack of intent to evade the ADEA by the pre-Act vintage of a particular retirement plan, the employer must show that its actions fall within the Section 4(f)(2) exception by coming forward with some other evidence demonstrating a lack of discriminatory animus against older workers (Pet. App. 11-12). The court of appeals concluded that petitioner's explanation for amendment of its retirement plan—i.e., that the union had initially suggested lowering

the normal retirement age and that this suggestion was adopted in a collective bargaining agreement—was insufficient to show non-discriminatory intent, especially in view of petitioner's "continued adherence to the amended plan in the face of the Union's changed position" (Pet. App. 13). The court of appeals also noted petitioner's awareness, at the time it agreed to the revision, of that court's decision in *Brennan* v. *Taft Broadcasting Co.*, 500 F. 2d 212 (1974), which treats the question whether a retirement plan is bona fide, and whether it represents a subterfuge to defeat the purposes of the ADEA, as distinct questions.

ARGUMENT

The court of appeals' conclusion—that petitioner violated the ADEA when, in 1974, it amended its retirement plan by reducing the mandatory retirement age for its flight attendants—is consistent with the plain language of Section 4(f)(2) of the ADEA as originally enacted, the decision of this Court in *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192 (1977), and the decisions of the other courts of appeals to consider the issue. Moreover, because Congress amended Section 4(f)(2) in 1978 to outlaw *all* involuntary retirements, based on a retirement plan, of persons within the protected age group (see note 2, *supra*), the issue lacks prospective importance and does not merit review by this Court.

1. Under the plan at issue in this case, petitioner involuntarily retired eight flight attendants solely because of their age. Petitioner's action violated the ADEA's basic prohibition against age discrimination unless it fell within the then-available exemption for bona fide retirement plans which are not a subterfuge to evade the purpose of the ADEA. Section 4(f)(2), 29 U.S.C. 623(f)(2).

In *McMann, supra*, 434 U.S. at 203, this Court defined "subterfuge" as it appears in Section 4(f)(2) as a "scheme, plan, stratagem, or artifice of evasion" and, thus, focused

upon the employer's intent in establishing the plan. The Court ruled that a provision in a plan adopted prior to the enactment of the ADEA could not be a subterfuge to evade an Act passed years later. The Court explained, 434 U.S. at 203:

> To spell out an intent in 1941 to evade a statutory requirement not enacted until 1967 attributes * * * a remarkable prescience to the employer.[4]

Where, as here, however, a retirement plan was amended after the enactment of the ADEA, an employer cannot demonstrate the absence of an impermissible discriminatory motive by pointing to the chronology of events.[5] The other courts of appeals which have considered the issue have agreed with the court below that an employer must advance legitimate non-discriminatory reasons for lowering the retirement age of its employees after the passage of the Act. See *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 495 (7th Cir. 1980); *EEOC* v. *Baltimore & O. R.R.*, 632 F. 2d 1107, 1113 (4th Cir. 1980), petition for cert. pending, No. 80-1929 (filed May 16, 1981). Petitioner's interpretation of Section 4(f)(2) would render the qualifying language "which is not a subterfuge to evade the purposes of this chapter" mere surplusage, adding nothing to the requirement that the plan be "bona fide."

2. Petitioner contends (Pet. 11-12) that its post-ADEA amendment of its plan could not have been a subterfuge because its retirement plan paid substantial benefits to

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[4]Consistent with *McMann*, the court of appeals in the instant case concluded that one legislative purpose underlying Section 4(f)(2) was "to 'grandfather' those pre-existing retirement plans which might not otherwise have survived judicial scrutiny under the new guidelines" (Pet. App. 10).

[5]The burden is on the party seeking to invoke Section 4(f)(2) to show that its actions were covered by the exception. *Smart* v. *Porter Paint Co.*, 630 F. 2d 490, 493 (7th Cir. 1980).

those involuntarily severed from employment.[6] Contrary to petitioner's assertion (Pet. 6, 8-10), no court of appeals which has considered an employer's post-ADEA actions has endorsed petitioner's contention and there is no conflict among the circuits on this issue. The only case cited by petitioner which addresses a mandatory retirement provision adopted after the passage of the ADEA is *Carpenter* v. *Continental Trailways*, 635 F. 2d 578 (6th Cir. 1980), cert. denied, No. 80-1578 (May 18, 1981).[7] In *Carpenter*, the

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[6]Petitioner appears to have abandoned its contention that the fact that the union initially proposed the amendment justified its continued adherence to the age 62 retirement requirement, since its petition alleges only that the court of appeals misinterpreted Section 4(f)(2). In any event, the court of appeals' decision in this respect is sound, for the reasons stated by the court (see page 4, *supra*). Moreover, the right to be free from invidious age discrimination is secured to the individual and cannot be bargained away in a collective agreement whose provisions do not otherwise satisfy Section 4(f)(2). Cf. *Barrentine* v. *Arkansas-Best Freight System, Inc.*, No. 79-2006 (Apr. 6, 1981), slip op. 11, 17.

[7]All of the other court of appeals decisions cited by petitioner either upheld mandatory retirement provisions adopted prior to the ADEA or do not address the issue presented here. In *Marshall* v. *Hawaiian Telephone Co.*, 575 F. 2d 763, 766 (9th Cir. 1978), the Ninth Circuit ruled, following *McMann, supra*, that a bona fide plan established in 1931 could not be a subterfuge to evade the purposes of the ADEA. Similarly in *Zinger* v. *Blanchette*, 549 F. 2d 901 (3d Cir. 1977), cert. denied, 434 U.S. 1008 (1978), a case decided prior to *McMann*, the court upheld an involuntary retirement effectuated under a pre-Act plan. The court thought that adoption prior to enactment of the ADEA could not insulate a retirement plan from invalidation as a subterfuge (549 F. 2d at 904-905), but reasoned that a plan which pays substantial benefits, regardless of its date of origin, could not be a subterfuge to evade the ADEA. After *McMann*, however, the authority of *Zinger* is clouded. See 434 U.S. at 207-208 (White, J., concurring). In *EEOC* v. *Shell Oil Co.*, 637 F. 2d 683, 684 (9th Cir. 1981), which also involved a plan or provision adopted before the ADEA's passage, the court did not consider the subterfuge issue at all, but only whether Shell Oil acted in observance of its plan and whether the 1978 amendment to Section 4(f)(2) was retroactive. Similarly, in *Sikora* v. *American Can Co.*, 622 F. 2d 1116, 1124 (3d Cir. 1980), the Third Circuit decided only the question of retroactivity, remanding to the district court for consideration of the distinct questions whether the plan was bona fide, and

Sixth Circuit examined the involuntary retirement at age 61 of an employee pursuant to a plan first adopted in 1974. The *Carpenter* court treated the questions whether the plan was bona fide and whether it was a subterfuge to evade the Act as distinct inquiries.[8] The Sixth Circuit ultimately found no subterfuge in the adoption of the retirement plan before it based upon "[e]vidence * * * that the plan was a legitimate instrument created to provide for the retirement of the company's employees," but acknowledged that a "plan * * * set up in 1974, after the enactment of the ADEA * * * should undergo more thorough scrutiny to determine whether its early retirement provisions were established to evade the purposes of the Act." 635 F. 2d at 581. The application of this standard to the record of a particular case is essentially a factual matter.[9] Any difference in emphasis between the analysis employed by the Sixth Circuit and that employed by the Fourth, Fifth and Seventh Circuits is insignificant given the 1978 amendment to the Act, which controls future cases.

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whether it was a subterfuge to evade the purposes of the ADEA. As to the latter inquiry, the court noted (*ibid.*):

> The Supreme Court held in *McMann* that a plan established before passage of the Act in 1967 was not a subterfuge. Alterations made to a plan after [the] ADEA was in effect, however, may be examined to see if the changes were designed to evade the purposes of the Act.

[8]Compare 635 F. 2d at 581 ("The final issue is whether Trailway's plan is a subterfuge.") with 635 F. 2d at 580 ("Trailways' retirement plan is bona fide. A plan that exists and pays substantial benefits—as does Trailways'—satisfies this criterion.").

[9]The retirement plan at issue in *Carpenter* was evidently first established in 1974. *Id.* at 580-581. The court observed that "it appears to have been adopted for the same reason that many companies and governmental agencies have adopted * * * retirement plans. Evidence exists that the plan was a legitimate instrument created to provide for the retirement of the company's employees." *Id.* at 581. Such a finding could not be made in the instant case, for the lowering of the retirement age at issue here serves no such business purpose. See *Sikora* v. *American Can Co.*, *supra*, 622 F. 2d at 1124, and note 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08